



No. H71 81

In the Supreme Court of the United States

OCTOBER TERM, 1941

THE UNITED STATES OF AMERICA, APPELLANT

v.

THE WAYNE PUMP COMPANY, ET AL.

**APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF ILLINOIS**

STATEMENT AS TO JURISDICTION



**In the District Court of the United States
for the Northern District of Illinois,
Eastern Division**

No. 32597 (Cr.)

UNITED STATES OF AMERICA

v.

THE WAYNE PUMP COMPANY ET AL.

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Supreme Court of the United States, as amended, the United States of America submits herewith its statement particularly disclosing the basis upon which the Supreme Court has jurisdiction on appeal to review the judgment of the District Court entered in this cause on February 24, 1942. A petition for appeal was filed on March 26, 1942, and is presented to the District Court herewith, to wit, on the 26th day of March 1942.

JURISDICTION

The jurisdiction of the Supreme Court to review by direct appeal the judgment entered in this cause is conferred by the Act of March 2, 1907, 34 Stat. 1246, as amended (18 U. S. C. Sec. 682), commonly known as the Criminal Appeals Act, and by 28 U. S. C. Sec. 345.

The following decisions sustain the direct appellate jurisdiction of the Supreme Court to review the judgment in this cause on the ground that the judgment is based upon a construction of the statute on which the indictment is founded. *United States v. Patten*, 226 U. S. 525; *United States v. Carter*, 231 U. S. 492; *United States v. Colgate & Co.*, 250 U. S. 300; *United States v. Hastings*, 296 U. S. 188; *United States v. Borden Co.*, 308 U. S. 188; *United States v. Hutcheson*, 312 U. S. 219.

STATUTE INVOLVED

The statute of the United States, the construction of which is involved herein, is Section 1 of the Act of July 2, 1890, 26 Stat. 209, as amended (15 U. S. C. Sec. 1), commonly known as the Sherman Act, the pertinent provisions of which are as follows:

SEC. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. * * *

Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine not exceeding \$5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

THE ISSUES AND THE RULING BELOW

The indictment in this case was returned on January 31, 1941. It charges The Wayne Pump Company (Wayne), Gilbert and Barker Manufacturing Company (G & B), Tokheim Oil Tank and Pump Company (Tokheim), all manufacturers of gasoline pumps, Veeder-Root, Incorporated (Veeder), a manufacturer of gasoline computing mechanisms, and Gasoline Pump Manufacturers Association, together with certain of their officers, with a continuing conspiracy from 1932 to the date of the indictment to fix the prices of computer pumps. Computer pumps are gasoline pumps embodying a computing mechanism which calculates and registers the quantities and prices of gasoline dispensed.

The allegations of the indictment may be summarized as follows:

In 1932 Wayne obtained a patent known as the Jauch patent on a computer pump. Wayne then entered into arrangements with Veeder for the latter to develop a commercially feasible computing mechanism, an indispensable element of every computer pump. Since 1938 Veeder has been the sole manufacturer of computing mechanisms for gasoline pumps.

Wayne, G & B, and Tokheim are the three leading manufacturers of gasoline pumps, selling 56 percent of all computer pumps sold in the United States, in 1939. In the same year these three com-

panies, together with eight other manufacturers licensed by Wayne, made all of the computer pumps sold in the United States, constituting 91 percent of the dollar volume of all gasoline pumps sold that year.

The indictment charges, *inter alia*, that it was a part of the conspiracy that Wayne, G & B, and Tokheim should use the Jauch patent to fix prices among themselves on their sales of computer pumps. It further charges that Wayne was to license G & B and Tokheim under the Jauch patent and was to acquire control of all patents on computer pumps and computing mechanisms competitive with pumps manufactured by Wayne, G & B, and Tokheim or with mechanisms manufactured by Veeder. Veeder, G & B, and Tokheim were to acknowledge the validity of the Jauch patent. Wayne, G & B, and Tokheim were to buy computing mechanisms only from Veeder; Veeder was to sell them only to Wayne, G & B, and Tokheim and those approved by them. Wayne, G & B, and Tokheim were to devise a formula for fixing prices and Wayne, on the basis of that formula, was to determine the minimum prices to which all three were to adhere. These defendants were also to determine jobbers' resale prices and were to refuse to sell computer pumps to any jobber who failed to adhere to such prices.

The indictment further alleges that Wayne was to grant no other licenses under the Jauch patent

except with the consent of G & B and Tokheim and upon terms authorized by them. Wayne was to induce computer pump manufacturers using mechanisms not made by Veeder to accept licenses under the Jauch patent on terms securing to Wayne, G & B, and Tokheim control of the licensees' patents, prices, and official personnel. Wayne was also to compel Neptune Meter Company, which, prior to 1938, engaged in the manufacture and sale of computer mechanisms and was Veeder's sole competitor in that business, to submit its patents to Wayne's control and to refrain from selling mechanisms except to customers approved by Wayne, G & B, and Tokheim. Gasoline Pump Manufacturers Association was to aid in enforcing adherence to the price-fixing scheme.

Demurrers to the indictment filed on behalf of all the defendants were sustained by the District Court. In its opinion the Court specifically referred to those allegations in the indictment charging that it was a part of the conspiracy (1) that the defendants use the Jauch patent for the purpose of fixing prices, (2) that they obtain control over all other patents on computer pumps and computing mechanisms and induce other manufacturers to accept licenses under the Jauch patent on terms that would give the defendants control over their prices, and (3) that the defendants Veeder, G & B, and Tokheim would acknowledge the validity of the Jauch patent. It held that these

allegations charged agreements which could lawfully be made under the monopoly of the Jauch patent. The other allegations, although not specifically mentioned by the Court, were disposed of by the following statement in the opinion:

I have read the indictments in their entirety several times, and in the various means, acts and devices whereby the combinations and conspiracies are alleged to have been accomplished, I do not find that defendants are charged with the doing of anything which they did not already have the right, under the patent, to do.

The court purported to base its decision upon various decisions of the Supreme Court and the lower federal courts dealing with the rights of a patentee and practices violative of the Sherman Act. It held that *United States v. Standard Sanitary Manufacturing Co.*, 226 U.S. 20, was inapplicable on the ground that there the patent owner and the licensees were using a process patent to fix prices on an unpatented article.

Although there are several statements in the opinion to the effect that certain allegations of the indictment are not clear or are indefinite and uncertain, and to the effect that if the Government charges that the defendants did something beyond the scope of the patent privilege it is not clearly set out in the indictments, a fair reading of the opinion in its entirety makes plain that the decision rests upon the ground that no violation of

the Sherman Act is alleged because the patent privilege exempts the acts charged from the prohibitions of that Act. It seems clear that the court, in stating that certain allegations were insufficient in form, meant that if those allegations were intended to charge anything beyond what the court found to be exempt from the Sherman Act by reason of the patent privilege, the allegations fail to do so in clear and certain terms. This interpretation of the opinion is supported by the fact that all of the decisions relied upon by the court to reach its conclusion relate to the scope of the Sherman Act and the patent law. We believe, therefore, that the decision cannot be said to be based upon the independent ground of indefiniteness, and accordingly that it is subject to review by this Court. *United States v. Borden Co.*, 308 U. S. 188; *United States v. Patten*, 226 U. S. 525; *United States v. Hastings*, 296 U. S. 188.

THE QUESTIONS ARE SUBSTANTIAL

The questions involved are substantial and of public importance. The effect of the decision of the District Court is to hold that a dominant group in an industry may combine and conspire to use a patent owned by one of the conspirators for the purpose of fixing the selling prices on the entire production of an important article of commerce. We believe that ruling to be contrary to the decision in *Standard Sanitary Mfg. Co. v. United States*, 226 U. S. 20. In that case the manufac-

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turers of a large percentage of all enameled iron-ware combined to use a patent held by one of the conspirators for the purpose of fixing the selling prices of all of them and the resale prices of their jobbers. This combination was held illegal under the Sherman Act. We think that there is no valid distinction between that case and the case at bar.

The District Court distinguished the *Standard Sanitary* case on the ground that it involved the use of a process patent to fix prices on an unpatented article. It is plain from the opinion of the Supreme Court that the distinction is without foundation. The Supreme Court, after holding that the combination was illegal, said (p. 49):

* * * this we say without entering into the consideration of the distinction of rights for which the Government contends between a patented article and a patented tool used in the manufacture of an unpatented article.

Furthermore, the indictment in this case should have been upheld upon the principle that a conspiracy entered into for the purpose of suppressing competition in an article is none the less illegal because one of the parties holds a patent on the article and could, acting alone and voluntarily, have lawfully imposed the same restraints on competition (*Interstate Circuit, Inc., v. United States*, 306 U.S. 208, 228-230), and that a combination between owners of different patents, formed

for the purpose of effecting a monopoly or fixing prices, is violative of the Sherman Act. *National Harrow Co. v. Hench*, 83 Fed. 36 (C. C. A. 3); *Blount Mfg. Co. v. Yale & Towne Mfg. Co.*, 166 Fed. 555 (C. C. D. Mass.); see *Standard Oil Co. v. United States*, 283 U. S. 163, 174-175; *Straus v. American Publishers' Ass'n*, 231 U. S. 222.

The questions presented by this case are also involved in other cases now being prosecuted by the United States. An authoritative decision will be of great aid in the orderly administration of the antitrust laws.

Respectfully submitted.

(S) **CHARLES FAHY,**
Charles Fahy,
Solicitor General.

**In the District Court of the United States
for the Northern District of Illinois,
Eastern Division**

Indictment No. 32597

UNITED STATES OF AMERICA

v.

THE WAYNE PUMP COMPANY, ET AL.

Indictment No. 32598

UNITED STATES OF AMERICA

v.

THE WAYNE PUMP COMPANY, ET AL.

The two above indictments were returned on January 31st, 1941.

Indictment No. 32597, known as the price fixing indictment, names as defendants four corporations: The Wayne Pump Company, a Maryland corporation; Gilbert & Barker Manufacturing Company, a Massachusetts corporation; Tokheim Oil Tank & Pump Company, an Indiana corporation; and Veeder-Root, Inc., a Connecticut corporation; one unincorporated association, the Gasoline Pump Manufacturers Association, its membership being composed of gasoline pump manufacturers, including Wayne Pump Company, G. & B. and Tokheim; and five individuals, who are officers of the various corporations, and charges

them with having entered into and engaged in a combination and conspiracy to fix, maintain and control the prices of gasoline computer pumps in interstate commerce, in violation of Section 1 of the Sherman Act (15 U. S. C. A. 1).

Indictment No. 32597, known as the monopoly indictment in count one charges the four corporations and four of the individuals named in indictment No. 32597 with having entered into and engaged in a combination and conspiracy to monopolize the manufacture and sale of computer pumps; and in count two with having entered into and engaged in a combination and conspiracy to monopolize the manufacture and sale of computer mechanisms in interstate commerce, in violation of Section 2 of the Sherman Act (15 U. S. C. A. 2).

The indictments cover a period of time beginning in 1932 and continuing to the time of the return of the indictments, and set out that the acts alleged in the indictments were performed within three years next preceding the date of the return of the indictments.

The following terms are used and defined in the indictments:

“gasoline pump” shall be deemed to refer to any pump designed to dispense gasoline. “computing mechanism” shall be deemed to refer to any mechanical device which may be used in connection with a gasoline pump, that simultaneously calculates and registers quantities and prices of gasoline dispensed by such pumps. The term “computing mechanism” shall also be deemed to include any mechanical device which may be used for varying the operation of a price register in a computing mechanism to enable such

register to indicate calculated prices corresponding with selective changes made in the unit price of the gasoline being dispensed. "computer pump" shall be deemed to refer to a gasoline pump embodying a ~~computing~~ mechanism.

"non-computer pump" shall be deemed to refer to any gasoline pump other than a computer pump.

"patent" shall be deemed to refer to applications for letters patent, applications for reissues of letters patent, as well as to patents.

The defendants, The Wayne Pump Company (hereinafter referred to as Wayne Pump Company), Gilbert & Barker Manufacturing Company (hereinafter referred to as G. & B.), and Tokheim Oil Tank & Pump Company (hereinafter referred to as Tokheim), are engaged in the manufacture of computer pumps. Defendant Veeder-Root, Inc. (hereinafter referred to as Veeder) is engaged in the manufacture of computing mechanisms. Defendant Gasoline Pump Manufacturers Association (hereinafter referred to as The Association) is a trade association whose membership consists, according to the indictment, "for the most part of gasoline pump manufacturers." The individual defendants named in the indictments are officers of the four corporations, and one employee of The Association.

C. M. Niezer, a resident of Fort Wayne, Indiana, who has been president of Tokheim during the period of time covered by these indictments, is named as a co-conspirator therein, but is not indicted. The indictments charge that during the period of time covered by them this co-conspirator

has been actively engaged in the management of Tokheim, and has conferred with the various defendants and with others, and has participated in the activities constituting the offenses charged in the indictments.

The indictments also charged that from 1932 to 1937 the Wayne Pump Company owned the stock of Wayne Company, an Indiana corporation, which was engaged in manufacturing and selling gasoline pumps, and acquired ownership and control of certain patents pertaining to computer pumps and computing mechanisms and entered into license agreements with reference to such patents. That the president of Wayne Pump Company during said period was vice president of the Wayne Company, and the Vice President of the Wayne Pump Company was president of the Wayne Company, and that Wayne Pump Company controlled the policies of the Wayne Company during that period. That in 1937 the Wayne Pump Company took over the assets, including the patents and licenses issued under them, and since that time has been directly engaged in manufacturing and selling gasoline pumps, and that the Wayne Company has ceased to manufacture or sell gasoline pumps.

Paragraphs 13 to 25, inclusive, of the indictments describe the nature of the trade and commerce involved, and set out that:

13. The use of gasoline pumps is essential to the proper supply of gasoline to the millions of passenger cars and trucks operating on the highways of the United States. Changes in types of gasoline pumps have paralleled the major changes and improvements in the manufacture of automobiles.

The earliest type of gasoline pump pumped gasoline out of one container into another container which acted as a measuring device. Later a gasoline pump was developed to measure a designated quantity of gasoline with a single stroke of the pumping handle. During the middle part of the twenties the so-called visible type of pump appeared on the market. On the top of the visible pump rested a large graduated glass bowl. The required amount of gasoline was pumped into this bowl, usually by hand, and was then dispensed to the customer by permitting gravity to carry the gasoline from the bowl to the gasoline tank in the motor vehicle. During the latter part of the twenties a great advance in gasoline pump construction was made in the development of the so-called meter pumps. This pump, operated either by hand or by electricity, contained in addition to the pump, a meter for measuring the quantity of gasoline. The quantity was then registered by means of pointers revolving around a clock type dial placed above the meter.

14. In 1933 the first computer pump was placed on the market and due to public demand, aided by an energetic marketing program, such pumps have since that date largely supplanted the non-computer pump. The computer pump was greatly favored by the public because the customer was able to see at a glance both the price and the quantity of the gasoline he had purchased. The shift in public demand from non-computer pumps to computer pumps has been so marked that for several years it has been all but impossible for any gasoline pump manufacturer to continue to engage in such business unless he manufactured computer pumps.

A table is then given showing this shift in sales from non-computer to computer pumps, from 1931 to 1939.

16. The magnitude of the industry is shown by the fact that there are approximately 1,300,000 gasoline pumps in use in the United States and approximately 100,000 gasoline pumps are sold in the United States each year, by gasoline pump manufacturers.

17. Prior to 1932, and during the period of time covered by this indictment, numerous applications for letters patent have been filed in the United States Patent Office on computer pumps, computing mechanisms, and improvements on computer pumps and computing mechanisms, and the United States Patent Office has issued numerous patents on such subjects. On or about November 22, 1932, the United States Patent Office issued a patent known as the "Jauch Patent" on a computer pump. The Jauch Patent was issued by the Patent Office to certain employees of the Wayne Pump Company who immediately assigned the said Jauch Patent to the Wayne Company. Under said Jauch patent and other patents issued as hereinafter described, the defendant Wayne has licensed certain other gasoline pump manufacturers to make, use, and sell computer pumps, as hereinafter alleged.

18. An indispensable element of every computer pump is the computer mechanism. Without a source of supply of such mechanisms a manufacturer cannot make computer pumps.

19. The defendant Wayne, both before and after the issuance of the Jauch patent, entered into certain arrangements and un-

derstandings with defendant Veeder, as hereinbefore alleged, whereby the manufacturing and other facilities and patents of the defendant Veeder were to be utilized in the development of a commercially feasible computing mechanism. The defendant Veeder developed such a mechanism and during the period of time covered by this indictment has manufactured such mechanisms and has sold such mechanisms in interstate trade and commerce, for use in computer pumps, only to defendants Wayne, G & B, and Tokheim, and such other manufacturers of gasoline pumps as are permitted by Wayne, G & B, and Tokheim to purchase computing mechanisms from Veeder.

20. The defendant Veeder manufactures computing mechanisms in the State of Connecticut and sells and ships such mechanisms to gasoline pump manufacturers in the States of Indiana, Massachusetts, Pennsylvania, Texas, and other states of the United States where computer pumps are manufactured. Such gasoline pump manufacturers, including defendants Wayne, G & B, and Tokheim, sell and ship computer pumps from their plants to customers located in other States of the United States, including customers in the Eastern Division of the Northern District of Illinois.

21. During the period of time covered by this indictment the Neptune Meter Company (sometimes hereinafter referred to as "Neptune") manufactured computing mechanisms in the State of New York and sold and shipped such mechanisms to numerous manufacturers of gasoline pumps, other than defendants Wayne, G & B, and Tokheim, located in states other than New York, who used such computing mechanisms in the

manufacture of computing pumps which were sold and shipped by such manufacturers to customers located in states other than where the computer pumps were manufactured. Such pumps were sold in competition with those manufactured by the defendant Wayne and its licensees, including G & B and Tokheim.

22. During the same period of time other gasoline pump manufacturers produced computing mechanisms which were used in computer pumps of their own make which were sold and shipped to customers located in states other than where the pumps were manufactured, in competition with the computer pumps manufactured by the defendant Wayne and its licensees, including G & B and Tokheim; and in competition with the computer pumps manufactured by companies purchasing computing mechanisms from Neptune.

23. Since the year 1938, however, the defendant Veeder has been the sole manufacturer in the United States of computing mechanisms used in computer pumps and the only available source of computing mechanisms used by manufacturers in the making of computer pumps.

24. The defendants Wayne, G & B, and Tokheim, during the period covered by this indictment, have been the three leading manufacturers of gasoline pumps in the United States. In 1939 such defendants manufactured and sold computer pumps constituting 56% of the value of all computer pumps sold in the United States, while Wayne, G & B, and Tokheim, with the other eight manufacturers licensed by Wayne, with the consent of G & B and Tokheim, to

buy computing mechanisms from defendant Veeder and make computer pumps, manufactured and sold 100 per cent of the computer pumps made and sold in the United States. In the same year gasoline pumps of all types manufactured by Wayne and its licensees constituted approximately 99 per cent of the value of all gasoline pumps manufactured and sold in the United States. In 1931, prior to the introduction of computer pumps, there were approximately thirty manufacturers of gasoline pumps in the United States.

25. Most of the computer pumps manufactured by defendants Wayne, G & B, and Tokheim and other manufacturers are sold in interstate trade and commerce to major oil companies and to independent gasoline station operators for installation in gasoline filling stations throughout the United States.

The indictments set out the combination and conspiracy, first in the price-fixing indictment, charging that all of the defendants—

* * * well knowing all of the facts alleged in this indictment, beginning in or about the year 1932 * * * and continuously thereafter up to and including the date of the presentation of this indictment knowingly have entered into and engaged in a combination and conspiracy to fix, maintain and control arbitrary, artificial and non-competitive prices for the sale of computer pumps in the aforesaid interstate trade and commerce, which combination and conspiracy, in fact, has been and is now in restraint of trade and commerce in violation of Section 1 of the Act of Congress of July 2, 1890 * * * commonly known as

the Sherman Act; which combination and conspiracy is now described in further detail, that is to say;

Thirty separate acts or means are then enumerated which are alleged to be "a part of said combination and conspiracy."

The indictment finally alleges that the defendants entered into the agreements and did the things they combined and conspired to do, and specifies in detail certain overt acts.

The monopoly indictment charges in count one that all of the defendants—

* * * well knowing all of the facts alleged in this indictment, beginning in or about the year 1932 * * * and continuously thereafter up to and including the date of the presentation of this indictment, knowingly have entered into and engaged in an unlawful combination and conspiracy to monopolize the manufacture and sale of computer pumps in the aforesaid interstate trade and commerce, which combination and conspiracy in fact has been and is now in violation of Section 2 of the Act of Congress * * * commonly known as the Sherman Act, which combination and conspiracy is now described in further detail, that is to say:

Twenty separate acts or means are then enumerated which are alleged to be "a part of said combination and conspiracy."

Count two charges that all of the defendants "knowingly have entered into and engaged in an unlawful combination and conspiracy to monopolize the manufacture and sale of computing mechanisms" in violation of Section 2 of the Sher-

man Act: Nineteen separate acts or means are enumerated which are alleged to be "a part of said combination and conspiracy,"

Demurrers, supported by briefs, have been filed on behalf of all of the defendants, and answering briefs have been filed on behalf of the Government.

The demurrers challenge the sufficiency of the indictments on the ground that they fail to describe the alleged conspiracies and combinations with which defendants are charged so as to inform them of the nature and cause of the accusations against them and enable them to properly prepare their defenses.

The cases are before me now for disposition on these demurrers.

SULLIVAN, District Judge, after stating the facts as above:

Two indictments have been returned against these defendants. In indictment No. 32597 they are charged with combining and conspiring "to fix, maintain and control arbitrary, artificial noncompetitive prices for the sale of computor pumps" in interstate commerce in violation of Section 1 of the Sherman Act. In indictment No. 32598 defendants are charged with combining and conspiring to monopolize the manufacture and sale of computing mechanisms in interstate commerce, in violation of Section 2 of the Sherman Act. Defendants Wayne Pump Company, G. & B. and Tokheim are manufacturers of computor pumps, and defendant Veeder is a manufacturer of computing mechanisms. Computor pumps and computer mechanisms, the subject matter of both the price fixing and the monopoly indictments, are covered by patents issued by the United States.

The indictments set out that the development of gasoline pumps has paralleled the major changes and improvements in the manufacture of automobiles; that from a rather crude beginning the type of gasoline pump in general was improved from time to time; that prior to 1932, however, a pump had not been developed which would automatically calculate and register both the quantities and prices of the gasoline dispensed.

On November 22, 1932, the United States patent office issued to one Jauch, an employee of the Wayne Pump Company, a patent covering the computer pump, which was subsequently assigned to the Wayne Company. The indictments set out that this patent revolutionized the gasoline pump business, and that as soon as computer pumps were placed on the market they superseded all other types of pump, so that by 1939 they represented over 90% in value of gasoline pumps manufactured and sold in this country. That the computer pump was greatly favored by the public because the customer was able to see at a glance both the price and quantity of the gasoline he had purchased, and that so great has been the shift in public demand from noncomputer pumps to computer pumps that for several years it has been all but impossible for any gasoline pump manufacturer to continue in business unless he manufactured computer pumps.

Following the grant of the Jauch patent and the commercial development of the computer pump manufactured thereunder, it appears that the Wayne Pump Company granted licenses to G & B and Tokheim to make, use and sell computer pumps. The indictments set out that at a later

period, when the computer pump became a success and the public demand for it became great, the Wayne Company granted licenses to eight other pump manufacturers. As owner of the patent the Wayne Company had the right to grant these licenses on its own terms and conditions, just as it had a right to completely exclude all others from making, using or selling computer pumps for the time prescribed in the statute, provided only that in so doing it did not violate any other law.

In the case of *Rubber Tire Wheel Co. v. Milwaukee Rubber Works Co.*, 154 Federal, 358, a patentee's rights were challenged under the Sherman Act. In sustaining the patentee's rights Judge Baker (C. C. A. 7th Circuit) said:

Under its constitutional right to legislate for the promotion of the useful arts, Congress passed the patent statutes. The public policy thereby declared is this: Inventive minds may fail to produce many useful things that they would produce if stimulated by the promise of a substantial reward; what is produced is the property of the inventor; he and his heirs and assigns may hold it as a secret until the end of time; the public would be largely benefited by obtaining conveyances of these new properties; so the people, through their representatives, say to the inventor: "Deed us your property, possession to be yielded at the end of 17 years, and in the meantime we will protect you absolutely in the right to exclude every one from making, using or vending the thing patented without your permission." (Citing cases.) Congress put no limitation, excepting the time, upon the monopoly. Courts can create none without legislating. * * *

Use of the invention cannot be had except on the inventor's terms. Without paying or doing whatever he exacts no one can be exempted from his right to exclude. Whatever the terms, courts will enforce them, provided only that the licensee is not thereby required to violate some law outside of the patent law, like the doing of murder or arson.

In *Continental Paper Bag Co. v. Eastern Paper Bag Co.*, 210 U. S. 405, the court said:

The inventor is one who has discovered something of value. It is his absolute property. He may withhold a knowledge of it from the public, and he may insist upon all the advantages and benefits which the statute promises him who discloses to the public his invention.

It (a review of prior cases) shows that whenever this court has had occasion to speak, it has decided that an inventor receives from a patent the right to exclude others from its use for the time prescribed in the statute. And for his exclusive enjoyment of it during that time the public faith is forever pledged.

In *Bement & Sons v. National Harrow Co.*, 186 U. S. 70, the owner of the patent granted a license to a manufacturer to manufacture harrows under the patent. The suit against the manufacturer was one to recover damages for a violation of licenses and to restrain further violations. Mr. Justice Peckham, in his opinion, rendered in 1902, said:

But that statute (Sherman Anti-Trust Law) clearly does not refer to that kind of a restraint of interstate commerce which

may arise from reasonable and logical conditions imposed upon the assignee or licensee of a patent by the owner thereof restricting the terms upon which the article may be used, and the price to be demanded therefor. Such a construction of the Act, we have no doubt, was never contemplated by its framers.

The owner of a patented article can, of course, charge such price as he may choose and the owner of a patent may assign it or sell the right to manufacture and sell the article patented upon the condition that the assignee shall charge a certain amount for such article.

In *United States v. General Electric Co.*, 272 U. S. 476, suit in equity was brought by the Government against the General Electric Company and the Westinghouse Electric Company to enjoin them from prosecuting a plan for the distribution and sale of patented electric lamps. The General Electric Company was the owner of patents on tungsten-filament-incandescent lamps, and in granting a license under its patents to the Westinghouse Company it fixed the price at which the Westinghouse Company could sell the patented lamps. After examining various cases on the subject, including *Bement v. National Harrow Co.*, *supra*, the Supreme Court said that the authority of the *Bement* case "has not been shaken by the cases we have reviewed." In dismissing the Government's bill and sustaining the right of the patentee-licensee to fix prices and impose other conditions under which the licensee could make, use, and vend the patented article, the court said:

The patentee may make and grant a license to another to make and use the patented articles; but withhold his right to sell them. The licensee in such a case acquires an interest in the articles made. But if he sells them he infringes the right of the patentee and may be held for damages and enjoined. If the patentee goes further, and licenses the selling of the article, may he limit the selling by limiting the method of sale and the price? We think he may do so, provided the conditions of sale are normally and reasonably adapted to secure pecuniary reward for the patentee's monopoly. One of the valuable elements of the exclusive right of a patentee is to acquire profit by the price at which the article is sold. The higher the price the greater the profit, unless it is prohibitory. When the patentee licenses another to make and vend, and retains the right to make and vend on his own account, the price at which his licensee will sell will necessarily affect the price at which he can sell his own patented goods. It would seem entirely reasonable that he should say to the licensee, "Yes, you may make and sell the articles under my patent, but not so as to destroy the profit that I wish to obtain by making and selling them myself."

In Rubber Tire Wheel Co. v. Milwaukee Rubber Works Co., 154 Fed. 358, the Rubber Tire Wheel Company, owner of the Grant patent on rubber tire wheels, had granted a number of licenses under which it exacted royalties, fixed the price at which licensees could sell the patented product, and imposed other terms and conditions. Suit was brought by the licensor to collect royalties from

the licensee, and the defense was set up that the license arrangement was unlawful under the Sherman Act. In reversing the lower court, the Circuit Court of Appeals for this Circuit held that the patentee-licensee had the right to fix prices on the patented article and to impose other conditions, and in sustaining the right of the licensor to recover its royalties, Judge Baker said:

The only grant to the patentee was the right to exclude others, and to have and to hold for himself and his assigns a monopoly, not a right limited or conditioned according to the sentiment of judges, but an absolute monopoly constitutionally conferred by the sovereign lawmakers. Over and above an absolute monopoly created by law, how can there be a further and unlawful monopoly in the same thing? If plaintiff were the sole maker of Grant tires, how could plaintiff's control of prices and output injure the people, deprive them of something to which they have a right? Is a greater injury or deprivation inflicted, if plaintiff authorizes a combination or pool to do what plaintiff can do directly? To say yes means that substance is disregarded, that mere words confer upon the people some sort of right or interest counter to the monopoly, when by the terms of the bargain the people agreed to claim none until Grant's deed to them shall have matured.

The indictments here charge the defendants Wayne Pump Company, G & B, and Tokheim with "using the Jauch patent" for the purpose of fixing prices among themselves on the sales of computer pumps, and for the purpose of restricting the manufacture and sale of such pumps. There is

no charge that defendants fixed the prices of gasoline pumps generally, or restricted their manufacture and sale. They are charged only with fixing the prices of computer pumps, a right which the Wayne Pump Company already had under the statutory monopoly granted by the Government when its patent was issued. What is meant by the phrase "used the Jauch patent" is not quite clear. If the defendants did more than enter into ordinary patent license agreements, under the terms of which the Wayne Pump Company, as owner of the patent, licensed the others to manufacture computer pumps, and fixed the prices at which the pumps should be sold; or if the Government claims that these defendants were involved in some offense under the Sherman Act other than the exercise of a patent monopoly, then such offense should be set out clearly in the indictments.

While ownership of the patent gives to the patentee a complete monopoly within the field of his patent, it of course does not give him any license to violate the provisions of the Sherman Act or any other law. Under his monopoly he may not use his patent as a pretext for fixing prices on an unpatented article of commerce; nor fix the resale price on his patented article; nor make use of "tying clauses." In the case of *United States v. Standard Sanitary Manufacturing Co.*, 226 U. S. 20, the patent owner and its licensees entered into a scheme for fixing prices on a common article of commerce—unpatented bath tubs—and then by a pretended use of a process patent attempted to evade the Sherman Act. This is obviously not the instant case, and the indictments do not allege that

there was any understanding or agreement among the defendants to use the patent to fix prices on any unpatented article. In fact there is no allegation that there was any understanding or agreement among the defendants at all, aside from the allegation that they "knowingly have entered into and engaged in a combination and conspiracy to fix and maintain noncompetitive prices and to monopolize the manufacture and sale of computer pumps and computing mechanisms, by the doing of the things set out." The things and means then set out are things which I believe the patentee, under its patent, already had the right to do.

The Government argues that the instant case and the *Bath Tub Case* have one basic common theme, that is conspiracy, joint action, agreement to use the patent for the purpose of fixing prices among themselves. The difficulty is that the Government fails to set out any identifying facts to show that the Wayne Pump Company and its licensees did anything more than the law permitted them to do under the monopoly granted by the patent. How they took joint action or entered into joint agreements to use the Jauch patent to achieve the alleged illegal objectives, or how they went outside the monopoly granted to the patentee and its licensees, is nowhere set out in the indictments.

The indictments also allege, as another of the means used to accomplish the illegal objectives, that the defendant Wayne Pump Company, with the consent of G. & B. and Tokheim, approached gasoline pump manufacturers purchasing computing mechanisms from Neptune, and other gasoline

pump manufacturers using computing mechanisms of their own make in the manufacture of computer pumps, and attempted to induce each of such manufacturers to accept a license under the Jauch patent; and that the Wayne Pump Company, with the authorization of G. & B. and Tokheim, would issue such license to each of such manufacturers on terms securing to the defendants control of all of the new licensee's patents on computing mechanisms and computer pumps and of the licensee's prices for the sale of computer pumps. Also that the defendant Wayne, with the consent of G. & B. and Tokheim, attempted to compel Neptune, the sole manufacturer and seller of computing mechanisms other than Veeder, to forever acknowledge the validity of the Jauch patent, to submit all patents on computer pumps and computing mechanisms owned or controlled by Neptune to uses determined by Wayne, and to refrain from manufacturing or selling computing mechanisms except to customers approved by Wayne, G. & B. and Tokheim.

Again it is not clear what is meant by the allegation that defendants attempted to compel Neptune to submit all patents owned or controlled by it on computer pumps "to uses determined by Wayne." With the issuing of the Jauch patent the Wayne Company dominated the computer pump field. In fact the indictments allege that the public demanded the new invention and that nineteen gasoline pump manufacturers ceased to do business because they did not have licenses to manufacture the computer pump. The entire world, other than the Wayne Company, was ex-

cluded for seventeen years from making, using or selling computer pumps, or any combination machine or unit which embodied the five elements described by Judge Slick in the case of *Wayne Company v. Anchor Oil Company*, 20 Fed. Supp. 745, as follows:

- (1) A source of liquid supply. (2) A pump, the suction side of which is connected to said source of liquid supply. (3) A meter.
- (4) A registering means operated by said meter for registering the liquid dispensed and the cost thereof. (5) Means for changing the relation between the cost operating portion whereby the unit cost per unit amount dispensed may be varied.

Judge Slick held the Jauch patent valid, and that the Neptune Company (manufacturer of computing mechanisms which were ultimately sold to the Anchor Company) was an infringer of the Wayne patent. The Neptune Company and the Anchor Oil Company were thereafter precluded from manufacturing, selling or using computer mechanisms for computer pumps, and all gasoline pump manufacturers who purchased computing mechanisms from them and used the same in the manufacture of computer pumps would also be infringers. Under these conditions I fail to see how defendants aided in carrying out an unlawful conspiracy because defendant Wayne Company, with the consent of G. & B. and Tokheim, approached gasoline pump manufacturers, who had purchased computer mechanisms from Neptune and other manufacturers, and attempted to induce them to accept licenses under the Jauch patent. If in attempting to induce these manufacturers to

accept such licenses, the Wayne Company, or any other of the defendants, made use of unlawful means, then those facts should be set out in the indictments. The indictments complain that an indispensable element of every computer pump is the computing mechanism, and without a source of supply of such mechanisms a manufacturer cannot make computer pumps. Under Judge Slick's decision, even with a supply of computer mechanisms no manufacturer can use them in the manufacture of computer pumps, save only as he is licensed by the Wayne Company to do so. Judge Slick held that the Jauch patent covered a meter and a registering means operated by said meter for registering the liquid dispensed and the cost thereof. It therefore follows that everyone making, using or selling this computer mechanism in connection with a computer pump would be an infringer.

The indictment also charges as one of the means or devices used in bringing about the combination or conspiracy that "the defendants Veeder, G. & B. and Tokheim acknowledge the validity of the Jauch patent." When G. & B. became licensees they were estopped from denying the validity of their licensor's patent, and I see nothing illegal or unlawful in the licensor requiring of them that they acknowledge the validity thereof, especially, as here, where its validity had already been established by the United States District Court of Indiana. Agreements which provide that licensees recognize the validity of the patent beyond the termination of the license are valid agreements. *United Shoe Machinery Co. v. Caunt*, 134 Fed. 239;

Eskimo Pie Corp. v. National Ice Cream Co., 20 Fed. (2d) 1003; 26 Fed. (2) 901. If any unlawful means were used in securing this acknowledgment, then the indictments should set them out clearly enough for defendants to meet these charges. Another means or device complained of in the indictments is that defendants determined jobbers resale prices for computer pumps, refused to sell computer pumps to any jobber failing or refusing to adhere to such resale prices, and that they eliminate discounts to all jobbers in the event of a general failure by jobbers to adhere to the said resale prices.

In a long line of decisions the United States Supreme Court has held that attempts to regulate future prices or future marketing of a patented article after complete sale by the owner thereof, were not valid exercises of the patent monopoly, and amounted to unlawful restraint of trade, invalid at common law, and, so far as interstate commerce was concerned, invalid under the Sherman Anti Trust Act of July 2, 1890. *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U. S. 373; *U. S. v. Schrader's Sons*, 252 U. S. 85; *Boston Store v. American Graphophone Co.*, 246 U. S. 8; *Sraus v. Victor Talking Machine Co.*, 243 U. S. 490.

The charge in the instant indictments is that "the said defendants determine jobbers' resale prices for computer pumps, refuse to sell computer pumps to any jobber failing or refusing to adhere to such resale prices, and eliminate discounts to all jobbers in the event of a general failure by jobbers to adhere to said resale prices." However, no facts are set out to show that the Wayne com-

puter pumps were sold through jobbers, nor are the names of any specific jobbers given with whom these defendants carried on negotiations wherein the resale price of computer pumps was determined. In the case of *United States v. Colgate & Co.*, 253 Fed 522, affirmed by the United States Supreme Court in 250 U. S. 300, defendant was indicted for conspiracy to fix the resale price at which wholesale and retail dealers might sell its product, the reference being to wholesalers and retailers generally, as is the reference in the instant indictments to jobbers generally. In the *Colgate* case the court said:

It does not seem to the court that the alleged offense with which defendant is charged is stated and set forth with that degree of accuracy and certainty required in criminal pleading. The facts in no particular combination, against any one set of wholesalers or retailers alleged to have been in combination with the defendants, are given, but merely that assurances and promises were made by the wholesale and retail dealers, doing business with the defendant throughout the United States and the Eastern District of Virginia, that its products would not be resold at retail other than at prices fixed by the defendant. This language is too general, and the defendant has the right at least to be informed of some one particular infraction of the law that it is claimed it has committed. It would be impossible to intelligently prepare a defense or answer to this indictment, as it involves defendant's dealings with its wholesale and retail customers throughout the territory named, covering a period of three

years. This is too indefinite, and there ought to be no difficulty, if such conditions exist, as set forth in the indictment, to name some specific instance of the alleged combination and state the same in detail.

So in the case at bar, if these conditions exist, the Government should have no difficulty in setting forth at least one specific instance of where defendants determined the resale price at which jobbers might resell computer pumps. If this condition does exist, surely the Government must be in possession of the facts, and they should be set out in the indictments, so as to reasonably inform defendants of the offense with which they are charged.

"Tying clauses" are also prohibited by Section 3 of the Clayton Act (U. S. C. A.), Title 15, Sec. 14) but no facts are set out in the present indictments which charge defendants with the creation of a monopoly by means of "tying clauses."

The Government in its argument insists that competing patents are here involved, and that a monopoly of competing patents was acquired by some of the defendants in furtherance of the plan to carry out the conspiracy, but the indictments set out no facts whereby to identify these competing patents, nor in what manner nor by whom such monopoly in them was acquired. The Government also insists that not one but many patents on computer pumps, computing mechanisms and improvements thereon were used to achieve the illegal purpose or conspiracy, but again the indictments are silent as to the identity of the other patents aside from the Jauch patent issued in November

1932. The indictments set out that changes in types of gasoline pumps have paralleled the major changes and improvements in the manufacture of automobiles; and that upon the advent of the computer pump it was so favored by the public that there was a marked shift from noncomputer pumps to the computer type, and that it thereupon became impossible for any gasoline pump manufacturer to continue to engage in such business unless he manufactured computer pumps. The Jauch patent dominated the computer pump field, and gave to its owners the right to exclude therefrom all others. As the indictment points out, the computer pump was so favored by the public that there was a definite shift to this type of pump, and it thereupon became impossible for any manufacturer to continue to engage in such business unless he manufactured the computer type of pump. This is the very thing they could do only with the permission of the Wayne Company and upon its terms and conditions. As said before, upon the issuance of the Jauch patent by the United States Government, the owner thereof was granted an absolute monopoly on the manufacture and sale of computer pumps at any price it chose to fix for same. Over and above this complete monopoly, I fail to see how the owner of the patent and its licensees could engage in any further and unlawful monopoly, unless they went outside of the domain of the patent and were guilty of doing things which the law does not permit them to do, and no factual allegations are set out in the indictments to show that they did this. I have read the indictments in their entirety several times, and in

the various means, acts and devices whereby the combinations and conspiracies are alleged to have been accomplished, I do not find that defendants are charged with the doing of anything which they did not already have the right, under the patent, to do. The fixing of prices and monopoly to manufacture and sell computer pumps, here complained of, were the very rights which the Wayne Company and its licensees enjoyed by reason of ownership of the patent. The courts have been unanimous in this construction of the rights of a patentee. If, in the interest of public policy, the monopoly which the patent laws confer upon an inventor seem too broad, redress must come from Congress not from the courts.

It is fundamental that in every indictment the defendant is entitled to be informed with such definiteness and certainty of the accusations against him as will enable him to make his defense, and avail himself of acquittal or conviction in any further prosecution for the same offense. Having in mind that the subject matter of the instant indictments is protected by a patent, I am of the opinion that the defendants here have not been furnished with such definite and particular allegations of fact as will meet this test. The charges are much too general. They do not adequately describe the nature of the alleged unlawful conspiracy agreements or arrangements which defendants are accused of having made, nor show how the defendants became parties thereto, nor how they collaborated in doing the unlawful things; nor set out any unlawful means whereby the unlawful objectives were accomplished.

Believing as I do, for the reasons heretofore stated, that the indictments are insufficient, the demurrers thereto will be sustained.

Enter.

(Sgd.) PHILIP L. SULLIVAN,
Judge.

FEBRUARY 17, 1942.